STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

EVA DEVILLERS, as Guardian and Conservator of
MICHAEL J. DEVILLERS,

Plaintiff-Appellee, Supreme Court No. 126899

vs.

AUTO CLUB INSURANCE ASSOCIATION,

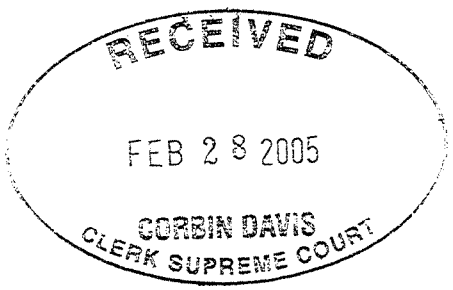
Defendant-Appellant.

Court of Appeals No. 257449
Oakland County Circuit Court No. 02-045287-NF

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE



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STATEMENT OF JURISDICTIONAL BASIS

ACIA appeals from the July 7, 2004, Oakland County Circuit Court Order denying Defendant's Motion for Partial Summary Disposition and from the July 30, 2004, Order and Opinion Denying Defendant's Motion for Reconsideration. Those are not final orders as denied by MCR 7.207 (7) (a). The Court of Appeals denied leave to appeal in an order entered September 21, 2004. This Court granted leave to appeal in an order entered November 29, 2004. This Court granted leave to appeal by virtue of MCR 7.301 (A) (2).

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STATEMENT OF STANDARD OF REVIEW

This case presents a question of statutory construction, which this Court reviews de novo. DiBenedetto v West Shore Hosp, 461 Mich 394, 401; 605 NW2d 300 (2000). Similarly, this Court reviews de novo decisions on summary disposition motions. Herald Co v Bay City, 463 Mich 111, 117; 614 NW2d 873 (2000).

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APPELLEE'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD LEWIS VS. DAIIE BE OVERRULED BY THIS COURT?

The trial court applied Lewis vs. DAIIE in denying Defendant-Appellant's Motion.

The Court of Appeals denied leave to appeal.

Plaintiff-Appellee contends the answer should be "Yes."

Defendant-Appellant contends the answer should be "No."

II. IF THIS COURT OVERRULES LEWIS VS. DAIIE SHOULD SUCH DECISION BE GIVEN PROSPECTIVE EFFECT ONLY?

The trial court did not address this issue.

The Court of Appeals denied leave to appeal.

Plaintiff-Appellee contends the answer should be "Yes."

Defendant-Appellant contends the answer should be "No."

III. IS REMAND OF THIS CASE TO THE TRIAL COURT FOR THE PURPOSE OF FURTHER DEVELOPMENT OF FACTUAL ISSUES THE APPROPRIATE REMEDY IN THIS PROCEEDING, PRIOR TO APPLYING THIS COURT'S DECISION TO THE DEVILLERS' CLAIM FOR BENEFITS?

Plaintiff-Appellee contends the answer should be "Yes."

Defendant-Appellant contends the answer should be "No."

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STATEMENT OF FACTS

INTRODUCTION:

At the time of the subject September 30, 2000, automobile accident, Plaintiff-Appellee MICHAEL DEVILLERS (hereinafter referred to "MICHAEL" in Statement of Facts) was sixteen (16) years old (6b). He had just begun his junior year at Brother Rice High School (71b) and was working part-time as a dishwasher at a local restaurant (20b). MICHAEL was a member of the varsity golf team at Brother Rice High School (50b and 51b).

MICHAEL was covered by a policy of No-Fault Insurance through his parents with Defendant-Appellant AUTO CLUB INSURANCE ASSOCIATION (hereinafter ACIA). He had medical insurance through HAP (71b and 72b).

SUMMARY OF INJURIES AND MEDICAL CARE:

After the automobile accident, MICHAEL was taken by ambulance to Huron Valley Hospital and then airlifted to the University of Michigan Hospital ("U of M") in Ann Arbor where he was treated for ***traumatic brain injury, multiple pelvic fractures, bladder ruptures/lacerations, a broken tooth, and multiple lacerations, as well as being in a coma for approximately five (5) days*** (126b).

After being airlifted to U of M Hospital/Mott's Children's Hospital ("MCH"), MICHAEL was admitted to U of M/MCH with a Glasgow Coma Scale Score of 5, along with the following diagnosis:

i. Bilateral superior and inferior pubic rami fractures;

ii. Right subdural hematoma (traumatic brain injury); and

iii. Extraperitoneal bladder rupture (128b and 129b).

Nine (9) days after the accident, Plaintiff-Appellee and his mother, Eva DeVillers (hereinafter Mrs. DeVillers), were seen in a psychotherapy session with Dr. Anne Bradley at the U of M Hospital.

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MICHAEL'S psychological injuries are discussed in Dr. Bradley's "Psychology Notes" of October 9, 2000:

> Patient was alert but oriented only to person and purpose. He reported the day as Friday. He could not recall where he was from one moment to the next. Mood was flat. Affect was agitated and labile. He had difficulty tolerating stimulation of questions about the accident or life prior to his accident. He became easily irritated, panicked, or distressed. Time sense was poor, impulse control was poor. Attention was fleeting. Short-term memory was limited to events in past 15-30 minutes . . . (130b)

Upon MICHAEL's release from the hospital on October 20, 2000, Dr. Ayyanger's recommended outpatient therapy included:

i. Case management/social work for additional outpatient insurance coverage is occupational therapy at the rate of three to five sessions per week for age-appropriate activities of daily living and schooling; physical therapy at the rate of three to five sessions per week, with goals of increased range of motion and bilateral lower extremity strengthening and balancing.

ii. Psychology/neuropsychology at the rate of three to five sessions per week, focusing on cognition, memory, and concentration.

iii. Speech/language pathology at the rate of three to five sessions per week, focusing on cognition, memory, and concentration.

iv. Therapeutic academics at the rate of three to five sessions per week, to begin rudimentary academic challenges.

v. Therapeutic recreation to focus on physical coordination, especially golfing.

vi. Driving evaluation is to be pending reassessment at follow-up with physician. (132b).

Follow-up recommendations included: (1) Physical Medicine and Rehabilitation with Dr. Rita Ayyanger in four to six week; (2) In Neurosurgery with Dr. Garth (the patient will need a repeat head CT within two to four weeks); (3) In Pediatric Orthopedics with Dr. Hensinger in two to four weeks; and (4) Pediatric Surgery with Dr. Covenn in two weeks (133b).

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Ten (10) days after MICHAEL was released from the hospital and returned home, he was referred to Children's Hospital of Michigan, Macomb Rehabilitation Center, Stepping Stone Program, for a two (2) week academic and cognitive therapy program. The Initial Evaluation Report from that program indicated that MICHAEL had participated in two (2) weeks of physical therapy, occupational therapy, speech-language therapy, therapeutic recreation, special education and psychological services (136b).

After MICHAEL returned home, Mrs. DeVillers did everything for him, including taking care of medical appointments for him (37b) and driving him to and from school (39b).

MICHAEL's special education tutor, Pat Smith, M.A. summarized his academic and cognitive services at the Stepping Stone School upon his return to Birmingham Brother Rice High School in her April 11, 2001, letter to Brother Rice High School as follows:

> **From November 2000 to January 12, 2001, I worked with Mike for 2.5 hours per week. Initial concerns were reported to be difficulty with word retrieval capabilities, organizational skills, processing skills, initiating tasks and short term memory. Since January 17, 2001, I have been working with Mike daily at Brother Rice High School during 8th hour. During the sessions, Mike has been very cooperative and will to complete all assignments.**
>
> **He continues to have difficulty with short term memory processing skills, fatigue, initiating tasks, long term planning and organizational skills. Since the accident, Mike has difficulty getting up in the morning and completing his morning routine. At a meeting at Brother Rice High School on January 17, 2001, it was determined that Mike only take five classes, 2nd hour through 7th hour.** (137b)

On February 15, 2001, Dr. Ayyangar examined Plaintiff at her U of M offices and provided three (3) prescriptions for MICHAEL's physical and psychological treatment: (1) **Patient cleared to function without close supervision** (emphasis added); (2) Neuropathalogical evaluation to evaluate vision problems; and (3) Pediatric neuropsychological evaluation to follow-up on TBI

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(traumatic brain injury) recovery, delineate cognitive deficits and assist with school recommendations (150b).

On January 8, 2002, MICHAEL began his medical treatment with Dr. Sherry L. Viola, a physical medicine and rehabilitation physician, referred to him by ACIA. Dr. Viola's initial report (153b and 154b) included the following Plan of Treatment:

> I would like to review some of the medical records related to Michael's accident and also suggest he needs neuropsych testing. I am at a loss as to why this was not done prior to his return to school in the year 2001. I provided him with a couple of referrals. I also suggested Michael needs to be very careful about further brain injury, both from a chemical standpoint and cautioned him against use of alcohol and marijuana and suggested he needs to wear a helmet when doing any type of high risk activity sports, such as rollerblading, skateboarding, bicycling, downhill skiing, snowboarding. Also encouraged that he wear his seat belt at all times, which he states that he does.
>
> I have concerns about Michael's ability to be competitive in a university setting since he is getting daily tutoring now and reports that his grades are rather average. I discussed this with him and his mother. I believe they both need supportive counseling from the standpoint of coping mechanisms, as well as reaction to the trauma and I believe Mrs. DeVillers needs supportive counseling and education also in this regards.
>
> They will follow up with me after neuropsych testing has been completed. (154b)

PERTINENT HISTORY OF CLAIM:

Nineteen (19) months after Dr. Ayyangar's February 15, 2001, assessment that MICHAEL was cleared to function "**without close supervision,**" ACIA, through its adjuster, Adrienne Tombelli f/k/a Adrienne Blackburn (hereinafter Ms. Tombelli), wrote an October 7, 2002, letter to Mrs. DeVillers memorializing ACIA's decision to stop home care payments (151b and 152b). That letter indicated that the reason for denial of home care/attendant care benefits beyond February 15, 2001, was MICHAEL'S discharge from "**supervision**" by his physician (151b and 152b).

Notwithstanding ACIA's October 7, 2002, refusal to pay for home care/attendant care services provided by Mrs. DeVillers (151b and 152b), she has continued to provide those services

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from February 15, 2001, through the date of filing this Brief, February 28, 2005 (155b-159b). **In fact, based upon a prescription from Dr. Owen Perlman dated October 15, 2003** (160b), **ACIA has chosen to once again start paying Mrs. DeVillers for home care/attendant care that she had been providing MICHAEL. After October 15, 2003, and continuing for the past fifteen (15) months, Mrs. DeVillers has been receiving payments from ACIA for three (3) hours per day for home care/attendant care services.**

ACIA claims in this appeal that Mrs. DeVillers never made a claim for home care/attendant care. ACIA's claim notes tell a completely opposite story (222b-238b). The April 26, 2001, Claim Notes, prepared by adjuster Ms. Tombelli, confirms that Mrs. DeVillers claim for home care as follows:

> **04-26-01 MRS DEVILLERS HAS SUBMITTED HER REQUEST FOR HOME CARE.... MIKE WAS AT STEPPING STONE BEGINNING OCT 30 AND AT SCHOOL BEGINNING DECEMBER. THE D/C RX FROM THE HOSPITAL FOR HOME CARE IS WAKING HRS, BUT MRS DEVILLERS IS CLAIMING 24 HRS DURING THAT TIME. I TRIED TO DISCUSS THIS WITH HER, BUT SHE BECAME VERY IRRATIONAL AND WAS SCREAMING AT ME. I ASKED HER TO TRY TO CALM DOWN SO WE COULD DISCUSS IT, BUT SHE EVENTUALLY HUNG UP ON ME. THIS IS A CMB CLAIM WITH HAP AS THE PRIMARY. THIS WAS DISCUSSED AT LENGTH WITH HER AT THE INITIAL HOME VISIT, BUT SHE WAS HAVING A LOT OF PROBLEMS, SO I ASSIGNED THE CASE TO VICKI SERWICK, CASE MGR, TO ASSIST HER.** (222b)[1]

As a result of Plaintiff and Defendant attorneys agreeing to continue the deposition at a later date, Ms. Tombelli's testimony regarding those claim notes did not occur. Prior to the scheduling of Ms. Tombelli's continued deposition, this Court stayed further trial court proceedings.

The May 10, 2001, Claim Notes, once again prepared by Ms. Tombelli, discusses attendant care as follows:

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[1] The claim file was produced by ACIA prior to Ms. Tombelli's deposition and was briefly discussed in her deposition, at 165b.

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5-10-01 REC'D CALL FROM MRS DEVILLERS CONCERNING ATTENDANT CARE. ADVISED I WOULD DISCUSS WITH ADRIENNE TO FIND OUT WHAT THE STATUS IS AND GET BACK WITH HER. SHE WAS VERY UPSET. SHE WAS MAD THAT AAA WAS NOT PAYING HER MED BILLS. (224b)

The May 17, 2001, Claim Notes discuss the lack of payment for the home care/attendant care:

05-17-01 RECD A CALL FROM EWA DEVILLERS. SHE SAYS SHE WAS TOLD BY SOMEONE THAT A CHECK WOULD BE IN THE MAIL DAYS AGO AND IT IS NOT THERE. I TRIED AGAIN TO DISCUSS HER SUBMISSION OF HRS, BUT SHE BECAME VERY ANXIOUS AND INSISTS THAT I AM DOING EVERYTHING NOT TO PAY HER. I TRIED TO ASSURE HER THAT IT IS NOT SO, I AM ONLY TRYING TO FIGURE OUT WHAT HRS TO PAY, NOT 'AVOID' PAYING. (224b and 225b)

Ms. Tombelli's June 5, 2001, Claim Notes state: "Home Care is now paid through 2/14/01 when Michael was released from Supervision" (225b). That note does not indicate denial, in any way, of any claim for home care/attendant care. Rather, the claim note only discusses denial of MICHAEL'S wage loss claim, "Since he was not employed on the date of loss, he would not be entitled to wage loss benefits" (225b).

After obtaining further information regarding her initial denial of wage loss benefits, Ms. Tombelli changed her mind on paying wage loss. From October 3, 2001, until August 26, 2002, ACIA paid MICHAEL wage loss benefits totaling Sixteen Thousand Six Hundred Fifty Six and 48/100 ($16,656.48) Dollars (212b). Claim Notes from October 1, 2001 (226b), October 3, 2001 (228b), June 11, 2002 (232b), and June 25, 2002 (233b) recognize the ongoing wage loss issues confronted by both MICHAEL and ACIA.

On July 30, 2002, Dr. Sherry Viola provided Ms. Tombelli a prescription memorializing Mrs. DeVillers case coordinator services provided to MICHAEL since the date of the accident (235b and 334b). Dr. Viola's de bene esse video deposition testimony confirmed the need for such case coordinator services for MICHAEL being performed by Mrs. DeVillers (274b and 275b).

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Claim notes dated October 22, 2002, confirm that Mrs. DeVillers once again brought to Ms. Tombelli's attention an error in her calculations regarding home care payments (238b). That note discussed wage loss again (238b), and confirms the mutual frustration shared by Mrs. DeVillers and Ms. Tombelli in attempting to resolve issues concerning the claim. Ms. Tombelli mentions in the note:

> **10-22-02 ...SHE THEN DEMANDED THAT I SEND HER COPIES OF ALL THE HOME CARE CHECKS BY THIS FRIDAY SO SHE CAN TAKE THEM TO AN ATTORNEY. I TOLD HER I WOULD REQUEST THEM, BUT I COULD NOT HAVE THEM BY THIS FRIDAY. SHE THEN SAID I AM PURPOSELY GIVING HER A HARD TIME. THERE DOES NOT SEEM TO BE ANYTHING I CAN DO THAT MEETS WITH MS DEVILLERS APPROVAL. I WILL WAIT TO HEAR FROM HER ATTORNEY.**

One month after this claim note, ACIA had received the lawsuit filed by MICHAEL (240b and 339b).

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INTRODUCTION

For the purpose of placing this matter in accurate factual context, the disputed benefits at stake in this Court's decision involve less than a nine (9) month period, commencing on February 16, 2001, and ending on November 12, 2001, the date that represents one year back from the filing of Plaintiff-Appellee's (hereinafter DEVILLERS) Complaint in the Oakland County Circuit Court. Defendant-Appellant's (hereinafter ACIA) misleading attempt to include this case in the class of cases where the "million dollar tail wags the litigation dog" (citing ACIA's Brief, page 5) would be laughable, but for the seriousness of the decision before this Court.

This case does not involve invocation of MCL 600.5851(1), the minority/insanity tolling provision of the Revised Judicature Act, as ACIA inaccurately claims. ACIA goes so far as to claim that the trial court invoked Lewis vs. DAIIE, 426 Mich 93; 393 NW2d 167 (1986), to circumvent Cameron vs. ACIA, 263 Mich App 95; 687 NW2d 354 (2004). ACIA once again misleads this Court by making such a statement. The trial court's opinion (ACIA's Appendix, 216a-221a), on the record, as well as ACIA's lawyer, Mr. James Gross' Motion for Consideration (ACIA Appendix 222a-225a), does not address MCL 600.5851(1) or Cameron, Id.

DEVILLERS argues against applying any decision of this Court to the claims at issue because the record in the trial court was not fully developed prior to ACIA's rushed request for review of this case. ACIA asks this Court to accept as undisputed fact that DEVILLERS never even made a claim for home care/attendant care prior to the filing of his Complaint. That factual issue is genuinely in dispute, considering the claim notes contained in ACIA's claims file referenced in the deposition of ACIA's adjuster (165b). That factual issue must be tried to resolution prior to applying Lewis or a new rule to the facts in this case. The fact that the adjuster's deposition was never concluded is merely one glaring example of the incomplete record in this case that ACIA never

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addressed in its Appellate Briefs. ACIA also failed to mention its voluntary reinstatement of home care/attendant care payments to Mrs. DeVillers, which took effect almost one-year after the November 12, 2002, filing of the DEVILLERS' Complaint. Payment for those benefits continue to this day. Had ACIA not been so selective in choosing the facts it presented in prior appellate applications, this Court may well have realized further factual development, in the form of a trial, was necessary prior to accepting leave to appeal.

Leave to appeal has nonetheless been granted. This Court has requested that two specific issues be briefed: (1) whether Lewis should be overruled; and (2) if Lewis is overruled, whether such decision should be given prospective effect only, pursuant to Pohutski v City of Allen Park, 465 Mich 675, 695-699, 641 NW2d 219 (2002).

DEVILLERS has presented a third issue for this Court to address. Prior to application of the Lewis decision or its new decision reversing Lewis to the case at bar, DEVILLERS requests that this Court remand this case for trial to resolve all disputed issues of fact. Such a procedural action will then allow this Court to later review this action with all the facts before it and with the potential new rule having been fully applied to those facts.

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ARGUMENT

I. SHOULD LEWIS VS. DAIIE BE OVERRULED BY THIS COURT?

The Pohutski, Id. and Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000) decisions carefully reviewed and applied: (1) the factors considered before overruling a prior decision of this Court; and (2) the factors to be weighed in determining when a decision overruling prior precedent should not have retroactive application.

DEVILLERS contends that application of these weighty factors and considerations to the Lewis decision warrants upholding the Lewis decision relating to MCL 500.3145(1). Should this Court disagree with DEVILLERS' contention in that regard, consistent with the Pohutski case and its progeny, DEVILLERS requests that this Court apply any decision to overturn Lewis prospectively, because to do so will be the most just and realistic solution to problems created by reversal of the Lewis decision. Pohutski, at 695, citing Placek v Sterling Heights, 405 Mich 638, 665; 275 NW2d 511 (1979).

If Lewis is to be reversed, this Court:

> [M]ust be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it. When it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case rather than following it, it becomes the duty of the court to correct it. (Cites omitted)

This Court echoed the above concern in a slightly different way in Robertson v Daimler Chrysler Corp, 465 Mich 732, 757 (2002):

> Before this Court overrules a decision, we must make two inquiries: (a) whether the earlier decision was wrongly decided, and (b) whether overruling such decision would work an undue hardship because of reliance interests or expectations that have arisen. Robertson, 757, citing Robinson v Detroit, 462 Mich 439, 463; 613 NW2d 307 (2000).

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ACIA contends that the Lewis decision was wrongly decided because it was contrary and inimical to the legislative intent set forth in the unambiguous language of MCL 500.3145(1). DEVILLERS, on the other hand, contends that the Lewis decision applied ambiguous statutory language consistent with the intent of the statutory scheme and interpreted the disputed language in context and harmony with other provisions of the first party benefits law.

MCL 500.3145 (1) states as follows:

> (1) **An action for recovery of personal protection insurance benefits payable under this chapter** for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, **the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.**

In Lewis, as in the case before this Court (see Plaintiff-Appellee's Statement of Facts), the injured claimant had ongoing contact with the insurance carrier adjuster, attempting to resolve differences of opinion on the claim. The claimant in Lewis was injured in an auto accident on November 13, 1978. Eight (8) months later, the plaintiff's attorney submitted an application for benefits. Within eight (8) days of submission of the application for benefits, the insurer requested further medical reports and the name of another potential insurer. In September and October 1979, the insurer responded to inquiries from a health care provider by saying it was awaiting information from the plaintiff's attorney. Lewis, at 95-97.

On November 14, 1979, one year and one day after the accident, the plaintiff's attorney wrote the insurer asking whether the claim would be paid and, if not, whether he could have written reasons for the denial. Five (5) days later, the insurer responded that the file was being reviewed for possible payment. Id. at 97.

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On February 22, 1980, the plaintiff filed suit. The insurer moved for accelerated judgment on the basis of §3145(1). The motion was denied. The jury returned a verdict for the plaintiff. The Court of Appeals affirmed. Id. at 97. This Court also affirmed. Relying on its decision in Tom Thomas Organization, Inc v Reliance Ins Co, 396 Mich 588, 242 Nw2d 396 (1976), and In Re Certified Question: Ford Motor Co v Lumbermens Mutual Casualty Co, 413 Mich 22, 319 NW2d 320 (1982), the majority imposed on §3145(1) the qualification that the running of the statutory period was tolled from the time that a claimant submits a specific claim for benefits until the time that the insurer formally denies the claim. Lewis, 426 Mich at 100, 101.

This pattern of direct contacts with the insurance company adjuster, in the hopes of resolving issues that exist in no-fault claims, was also examined in Hudick v Hastings Mut Ins Co, 247 Mich App 602, 637 NW2d 521 (2001), a Michigan Court of Appeals decision that followed Lewis fifteen (15) years after Lewis was decided.

In Hudick, the plaintiff was severely injured on February 19, 1997, when his two-wheel vehicle collided with a van. Because plaintiff lived with his parents, their no-fault insurer, Allstate Insurance Company, began paying plaintiff's personal protection insurance (PIP) benefits on a coordinated basis. Defendant, which insured the van under a policy that did not coordinate medical benefits, had been notified of the accident and the serious nature of plaintiff's injuries. As early as March 18, 1997, defendant believed that it was the primary insurer under the no-fault law, but it actively withheld this belief from plaintiff's attorney and Allstate. On October 29, 1997, after it was determined that the vehicle that plaintiff was operating was a "motorcycle" under the no-fault act, defendant advised plaintiff's attorney that it would assume responsibility for plaintiff's first-party benefits. Id. 604

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On May 13, 1998, plaintiff's attorney sent a letter to defendant's claim representative, noting that payment of first-party benefits was not coordinated under defendant's policy and demanding payment from defendant for hospital expenses incurred by plaintiff between February 19, 1997, and March 14, 1997. Defendant denied payment on May 20, 1998, because all the expenses were incurred more than one year before the request for payment. Plaintiff filed the instant action on July 10, 1998. Id. 604-605

Like the Lewis and Hudick cases, the case at bar is fact-intensive because both the injured insured person and the insurance company made valiant efforts at resolving their disputes before litigation commenced. Since Lewis was decided, such actions between parties to the insurance contract have promoted voluntary payment of first party claims and allowed for resolution of claims for the vast majority of claims, without the need for litigation.

The Lewis opinion justified the tolling provision by recognizing:

> Most persons are confident that, in the event of a loss, their insurer will pay their claim without the necessity for litigation. **It is only when an insurer denies liability that it is unequivocally impressed upon the insured that the extraordinary step of pursuing relief in court must be taken. A contrary result today would require the prudent claimant to file suit as a precautionary measure when the one-year deadline approached, regardless of the status of the claim.** In addition to requiring a level of sophistication many claimants may not possess, **such an approach would encourage needless litigation.** One of the important reasons behind the enactment of the no-fault system **was the reduction of automobile accident litigation.** (Emphasis added)

The Lewis court justified application of the tolling provision to MCL 500.3145(1) by citing precedent for such judicial tolling:

> In *American Pipe & Construction Co v Utah*, 414 US 538, 559; 94 S Ct 756; 38 L Ed 2d 713 (1974), the United States Supreme Court stated:
>
> > These cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of

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> the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

Plaintiff-Appellee contends that for over fifteen (15) years, the tolling provision in Lewis promoted timely submission and payment of claims and reduced litigation significantly. Allowing the parties to the insurance contract time and flexibility to resolve claims without the sword of litigation hanging over either parties' head has been effective in processing "**the tens of thousands of claims per year for different products services and accommodations**" that ACIA cited as significant in its Appellant's Brief, at page 23. Considering the hundreds of thousands of claims and millions of dollars in paid benefits to claimants and medical care providers that did not require litigation to resolve, the amount of litigation has been insubstantial.

To put it simply, the Lewis decision worked. That decision made sense of an ambiguous statute, as written, and as applied in the real world of first party claims adjustment.

At first blush, MCL 500.3145(1) reads easily enough. In fact, cases prior to Lewis indicated that the statute needed no interpretation. Aldrich v Auto-Owners Ins. Co., 106 Mich App 83, 307 NW2d 736 (1981); Allstate Ins. v Frankenmuth Ins., 111 Mich App 617, 314 NW2d 711 (1981). Those cases failed to fully and completely analyze the plain words of MCL 500.3145(1) within the context of the entire no fault benefit statutory scheme. Had those decisions considered the entire statutory scheme, as required by the doctrine of *noscitur a sociis*, those Court of Appeals decisions would have concluded that the statute of limitations language in MCL 500.3145 was ambiguous and required the broader reading later afforded it in Lewis.

In G.C. Timmis v. Guardian Alarm Co., 468 Mich 416 (2003), the Michigan Supreme Court held:

> When construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the

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> statute. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed. (Cites omitted) Timmis, at 420.

The Timmis decision determined the meaning of "real estate broker" under the real estate brokers act (REBA) (MCL 339.2501 et seq.) by utilizing the doctrine of *noscitur a sociis*, i.e. that "a word or phrase is given meaning by its context or setting," to assist in interpreting §2501(d) of that act. The Court explained the various reasons for applying that doctrine of statutory construction:

> Next, we apply *noscitur a sociis* to the individual phrases of § 2501(d), as well as to the other provisions of REBA because the emphasized language does not stand alone, and thus it cannot be read in a vacuum. Instead, "[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . . [W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. "In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." (Cites omitted)
>
> After reviewing the pertinent statutory provisions in REBA, the Court held:
>
> The purpose of REBA, which is to protect the integrity of real estate transactions by ensuring that they are brokered by persons expert in that realm, requires the interpretation that REBA applies only to real estate transactions. The conclusion that the emphasized language of § 2501(d) applies only to real estate transactions affords reasonable meaning to this language within the context of the provisions that surround it, while maintaining the focus of REBA on transactions involving the purchase or sale of business real estate.
>
> Alarm contracts are not real estate and, thus, at least on the basis of the present record, REBA is not applicable to this transaction, which apparently involved only the purchase of such contracts. Timmis, at 424.

The Court in Timmis correctly remanded that case to the trial court for a determination of whether a real estate transaction was involved, because:

> Our interpretation of § 2501(d) has not been previously set forth, and because this case was resolved on summary disposition where the record may not have been developed in light of this interpretation. *Id.*, at 424-425.

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This Court must therefore examine the language of MCL 500.3145 within the context of the other statutory provisions that apply to payment of no fault benefits.

MCL 500.3105 makes an insurer "**liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter**." The pertinent statute of limitations language in MCL 500.3145 is:

> If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.*

Allowable expenses are defined separately from work loss or survivor's loss in MCL 500.3107(1)(a) and (b):

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00.
>
> (b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies...

MCL 500.3142(1) states that "personal protection insurance benefits are payable as loss accrues." MCL 500.3142(2) states as follows:

> Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by

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> reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer.

Pursuant to §3142(2), interest is assessed in the event of late payment, and attorney fees may be awarded against the insurer for overdue benefits if a court finds the insurer unreasonably refused to pay or unreasonably delayed in making payment. MCL 500.3148.

The first sentence of MCL 500.3145 states "if the notice [of the injury] has been given or a payment [of benefits] has been made, the action may be commenced at any time within one year after the most recent allowable expense, work loss or survivor's loss has been incurred." The second sentence of MCL 500.3145 then states "However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

Does the loss mentioned in the second sentence relate back to the work loss and survivor's loss in the previous sentence, thereby excluding allowable expenses from the one year limitation? Or does that loss refer to the loss mentioned in MCL 500.3142(1) which states "Personal protection insurance benefits are payable as loss accrues"?

The second section in 500.3142 also refers to "proof of the fact and of the amount of loss." If "the loss" in the second sentence of 500.3145 discussed above refers to the loss in MCL 500.3142(1) and (2), then the practical effect of the one-year limitation is to negate the statutory obligation of the insured precisely and unambiguously stated in 500.3142(1), "[p]ersonal protection insurance benefits are payable as loss accrues." This creates a payment obligation immediately as loss accrues, without regard to time limits.

Plaintiff-Appellant contends that the statute of limitations language of MCL 500.3145, when read in context with the other provisions of the statute, creates ambiguities that required and allowed the Lewis court to look beyond the language of the statute to enforce its judicial tolling provision.

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In part, those ambiguities result from a statute that, on the one hand, promotes submission of claims and payment thereof on an ongoing basis, i.e. "benefits are payable as loss accrues", but on the other hand, takes away that immediate insurance obligation to pay any portion of a claim incurred beyond one year before the date litigation is commenced. The statute promotes cooperation between the insured and insurer, but at the same time mandates the immediate filing of litigation to adequately protect all claims occurring one year after the accident. These inconsistences could only be reconciled by the Lewis tolling provision.

The statutory ambiguity comes into greater focus when the language of MCL 500.3145 (1) is compared to the unambiguous language of Section 2 of MCL 500.3145, the section that establishes a statute of limitations for recovery of property protection benefits.

Section 2 of the statute in dispute states, without any ambiguity whatsoever, "**an action for recovery of property protection insurance benefits shall not be commenced later than one year after the accident.**" The "shall not be commenced" language stands in stark contrast to the permissive language clauses such as "may be commenced" and "the claimant may not recover" existing in Section 1 of MCL 500.3145.

In Secura Ins Co v Auto-Owner Ins Co, 461 Mich 382, 387 (2000), this Court reviewed a case where the Plaintiff was claiming, notwithstanding the clear language of Section 2 in the statute, judicial tolling should allow for a late claim being filed for property protection insurance. This Court held that:

> This is a case where the statute speaks for itself, and there is no need for judicial construction. The Legislature has decried that property damage claims must be brought within one year of the accident. There is no hint in the language of subsection 2 that the Legislature intended that there be any tolling of that time. Secura, Id.

Consideration must be given to the significant differences in statutory language between Sections 1 and 2 of the disputed statute. If the Legislature had wanted to forestall any chance of

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judicial tolling regarding first party benefit claims, the same mandatory language would have been used in both sections of the same statute. Instead, the Legislature chose very different language when confronting personal protection benefits limitations. The permissive nature of the language in Section 1 of the statute is consistent with the tolling provision provided in Lewis.

In addition to reducing litigation of first party benefits claims, the tolling provision in Lewis also upheld long established policy reasons for statute of limitations in Michigan law. In Gladych v New Family Homes, Inc., 468 Mich 594 (2003), this Court noted the various policies underlying all statutes of limitations:

> By enacting a statute of limitations, the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim. The policy reasons behind statutes of limitations include: the prompt recovery of damages, penalizing plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay.... (Citations omitted) Gladych, at 600.

By requiring a clear denial of a claim by the insurance company, insured claimants could determine an exact date when there was no chance of a prompt recovery of damages, thereby being able to decide whether litigation for recovery of those damages was necessary. If the plaintiff failed to react promptly to the denial, loss of the claim would result.

For over fifteen (15) years, stale claims have not been an issue until the Cameron decision altered the landscape concerning brain injured claimants. By providing a clear denial of benefits, defendant insurance companies would know the risks associated with each claim, thereby negating the unknown associated with litigation.

Last, the insurance company controlled its involvement in every claim by either paying submitted claims or denying those claims. Either of those actions would reduce any inconveniences that might otherwise result from delay in paying the claim.

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II IF THIS COURT OVERRULES LEWIS V DAIIE SHOULD SUCH DECISION BE GIVEN PROSPECTIVE EFFECT ONLY?

Prospective application of a holding is appropriate when the holding overrules settled precedent or decides an "issue of first impression whose resolution was not clearly foreshadowed." Lindsey v Harper, 456 Mich 56, 68 (1997), citing People v Phillips, 416 Mich 63, 68; 330 NW2d 366 (1982). (Emphasis added) It cannot be disputed that this Court will be overruling settled precedent in the event Lewis is reversed. This Court's Order Granting Leave to Appeal makes that fact clear (380a). The first requirement for prospective application of a decision overturning Lewis would therefore be fulfilled.

ACIA's claim that reversal of Lewis was foreshadowed in prior decisions and in its dissenting opinion, therefore, no new rule of law would result has no merit. In Wayne County v Hathcock, 471 Mich 445; 684 NW2d 765 (2004) this Court reversed Poletown Neighborhood Council v Detroit, 410 Mich 616, 304 NW2d 455 (1981) and applied its decision retroactively. This Court determined that no new rule of law resulted from the reversal because of the "radical departure from fundamental constitutional practices" espoused by the Poletown decision. Hathcock, 684 NW2d, at 787.

In contrast to such a radical departure from prior law, the Lewis decision resolved a genuine conflict existing between various decisions of the Court of Appeals. Interpretation of MCL 500.3145 was in a state of flux. Reversal of the Lewis decision would not return the law to that which existed before it. If that were the case, the conflict between various Court of Appeals decisions would remain.

In Riley v Northland Geriatric Center (After Remand), 431 Mich 632; 433 NW2d 787 (1988), Justice Griffin quoted with approval the following language in Placek v Sterling Heights, 405 Mich 638, 665; 275 NW2d 511 (1979), reh den 406 Mich 199 (1979):

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> This Court has overruled prior precedent many times in the past. In each instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change." Riley, Id. at 645.

Justice Griffin also acknowledged that while fairness was a goal in resolving the retrospective-prospective issue, the three part test set forth in Linkletter v Walker, 381 US 618; 85 SCt 1731; 14 LED2d 601 (1965), must be applied to determine the issue. Riley, at 645. The Linkletter decision weighed: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect of retroactivity of the administration of justice.

More recently this Court applied the Linkletter three-pronged test in Pohutski to its decision to overturn prior ruling interpreting the governmental tort liability act, MCL 691.1407 to allow for a trespass nuisance exception to governmental immunity. The Pohutski majority adopted Justice Griffin's partially dissenting opinion from the cases overturned, Hadfield v Oakland Co Drain Comm'r, 430 Mich 139, 422 NW2d 205 (1988) and Li v Feldt (After Remand), 434 Mich 584, 592-594; 456 NW2d 55 (1990), and concluded that reversal of those decisions was to be applied prospectively. The Pohutski analysis applying its decision prospectively parallels the reasons why this Court must prospectively apply a decision to overturn Lewis, if in fact such a decision is made.

After applying Riley to its decision, this Court in Pohutski concluded:

> Practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretation set forth in Hadfield and Li." Pohutski, at 696.

Applying the Linkletter three-part test also led to the Court's conclusion to apply its decision prospectively:

> First, we consider the purpose of the new rule set forth in this opinion: to correct an error in the interpretation of § 7 of the governmental tort liability act. Prospective application would further this purpose. See *Riley, supra* at 646. Second, there has been extensive reliance on *Hadfield*'s interpretation of § 7 of the governmental tort liability act. In addition to reliance by the courts, insurance decisions have undoubtedly been predicted upon this Court's longstanding interpretation of § 7 under *Hadfield*: municipalities have been encouraged to purchase insurance, while

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> homeowners have been discouraged from doing the same. Prospective application acknowledges that reliance. Third, prospective application minimizes the effect of this decision on the administration of justice. Consideration of recently enacted 2001 PA 222 strengthens our determination to limit our holding to prospective application. 2001 PA 222 amends the governmental tort liability act to provide a remedy for damages or physical injuries caused by a sewage disposal system event. Pohutski, at 697.

One of the reasons given in denying retroactive application also dealt with the Court's concern that "the plaintiffs in cases currently pending would not be afforded relief under the overturned cases. . . Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing." Pohutski, at 699. Applying the three-part test discussed in Pohutski, *infra*, to the case at bar leads to the logical conclusion that prospectivity applies to this case.

First, as in Pohutski, if this Court reverses Lewis, it will do so to correct an error in the interpretation of a statute.

Second, it is beyond doubt that claimants, insurance companies, medical services providers, and attorneys involved in the adjustment of first party claims, have extensively relied on the Lewis decision. As Pohutski recognized, prospective application of the new rule would acknowledge that reliance.

Third, prospective application would minimize the effect of reversing Lewis on the administration of justice. If applied retroactively, limited or otherwise, litigation on thousands of lawsuits would be commenced for fear that the ticking time bomb of the inflexible one year back rule would explode, causing massive financial losses to medical providers and creating liability for unpaid medical expenses incurred by injured claimants.

Rather than reduce the litigation expenses of claimants and insurance companies alike, lawyers on both sides of the aisle would benefit handsomely from a retroactive reverse of Lewis.

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Even on the smallest of claims, litigation would necessarily result from the time bomb effect of a strictly applied statute.

If this Court applied full or limited retroactivity to its reversal of Lewis, a distinct class of litigants would be denied relief. The distinct class of claimants would include: (1) claimants who may have filed a lawsuit depending on Lewis; (2) non-litigant claimants who have depended on Lewis by waiting to litigate hoping that prior submitted claims would not be denied; and (3) medical provider claimants who have, like the injured claimants, decided to wait for a denial by the insurance company before commencing collection actions against the insured or the insurance company.

Application of the Pohutski reasoning to the case at bar mandates prospective application of a potential reversal of the Lewis decision. Any other conclusion would ignore the well established tenets upon which Pohutski was decided, and would ignore the goal of fairness acknowledged by Justice Griffin.

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III IS REMAND TO THE TRIAL COURT FOR THE PURPOSE OF FURTHER DEVELOPMENT OF FACTUAL ISSUES THE APPROPRIATE REMEDY IN THIS PROCEEDING, PRIOR TO APPLYING THIS COURT'S DECISION TO DEVILLERS' CLAIM FOR BENEFITS?

In determining the appropriate remedy in this case, this Court must bear in mind that of the benefits in dispute, which involve a time frame of thirty-two (32) months, from February 16, 2001, to October 15, 2003, only nine (9) months of benefits will be barred regardless of this Court's decision. Thus, issues regarding DEVILLERS entitlement to attendant care, case management benefits, and payment of various medical bills will be tried relating to the twenty-three (23) month period not barred by a potential reversal of the Lewis tolling provisions.

At trial, ACIA will not dispute that it agreed to reinstate attendant care services after October 15, 2003, the same services that ACIA has denied for the thirty-two (32) months prior to October 15, 2003. That undisputed fact will bear great weight in proving Plaintiff-Appellee's claim. Likewise, the Claim Notes of ACIA's adjuster (206b-250b), Ms. Tombelli, will demonstrate that a claim for home care or attendant care was made by DEVILLERS many months after ACIA terminated those benefits on February 15, 2001. Such a disputed fact cannot be resolved in the context of this appeal.

In Timmis, infra, remand was deemed the proper remedy, so as to allow further factual development applicable to the legal conclusions reached by this Court. DEVILLERS contends that a similar remand to develop disputed facts is necessary and appropriate here, if in fact this Court reverses Lewis and applies its decision to the DEVILLERS' claim.

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RELIEF

Plaintiff-Appellee, EVA DEVILLERS, as Guardian and Conservator of MICHAEL J. DEVILLERS, prays that this Honorable Court uphold its Lewis v DAIIE decision and remand this case for further proceedings consistent with its decision.

In the event this Court chooses to overrule Lewis v DAIIE, Plaintiff-Appellee requests that only prospective effect be given to that decision, thereby allowing this Court to remand this matter for further proceedings consistent with its decision.

If, however, this Court reverses Lewis v DAIIE and holds that its decision is applicable to Plaintiff-Appellee's claim, Plaintiff-Appellee request that the matter be remanded for trial, after which the trial court will apply this Court's decision to the facts as developed at trial.

Respectfully submitted,

IHRIE O'BRIEN

February 28, 2005.

By: 

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